

SENATE BILL No. 520

DIGEST OF INTRODUCED BILL

Citations Affected: IC 4-13.6-2-4; IC 5-16; IC 36-1-12; IC 35-44-1-8; IC 36-1-12-7.

Synopsis: Specifications in public work projects. Requires specifications for public works projects to be written to encourage free, open, and competitive bidding and refrain from calling for unique or proprietary materials. Provides that a person who prepares, participated in the preparation of, or conferred any property on another person who prepared or participated in the preparation of the specifications of a public work project may not be awarded a contract for the public work project. Requires that plans and specifications for a public work project with a cost of more than \$100,000 must be approved by a registered architect or engineer. Provides that if the attendance of a bidder at a prebid meeting or conference is a condition to the acceptance of a bid from that bidder, that requirement must be published in the same fashion and for the same period as the board must advertise the date of receiving bids. Requires the noncollusion affidavit submitted with a public work bid must be affirmed under the penalties for perjury and that the affidavit must affirm that the bidder did not violate the requirements for public work specifications. Provides that a person who has certain responsibilities relating to the award of a public work contract who solicits, accepts, or agrees to accept any property from another person in return for an agreement to: (1) purchase or recommend the purchase of the other person's supplies, materials, or services with respect to a public work project; (2) incorporate or recommend incorporation of the other person's supplies, materials, or services into specifications for a public work project; (3) award or recommend the award of a public work contract to that other person; or (4) recommend, promote, or endorse that person's supplies, (Continued next page)

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Effective: July 1, 2009.

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January 15, 2009, read first time and referred to Committee on Commerce, Public Policy & Interstate Cooperation.



materials, or services with respect to the public work project commits a Class D felony. Provides that a person who offers, confers, or agrees to confer any property on a contract officer to do any of these acts commits a Class D felony. Provides that a person may not solicit, accept, or agree to accept any property in return for an agreement not to bid or compete on a public work project or to participate in an arrangement to suppress or eliminate full and unrestricted competition for the award of a public work contract commits a Class D felony. Repeals a superseded statute. Makes other technical changes.

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Introduced

First Regular Session 116th General Assembly (2009)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2008 Regular Session of the General Assembly.

SENATE BILL No. 520

A BILL FOR AN ACT to amend the Indiana Code concerning state and local administration.

Be it enacted by the General Assembly of the State of Indiana:

- 1 SECTION 1. IC 4-13.6-2-4 IS AMENDED TO READ AS
2 FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 4. The division shall
3 comply with this article and the following statutes in the administration
4 of public works contracts:
5 (1) IC 5-16-3.
6 (2) IC 5-16-6.
7 (3) IC 5-16-7, if the estimated cost of the public works project is
8 at least twenty-five thousand dollars (\$25,000).
9 (4) IC 5-16-8.
10 (5) IC 5-16-9.
11 **(6) IC 5-16-13.**
12 **(7) IC 5-16-14.**
13 SECTION 2. IC 5-16-13 IS ADDED TO THE INDIANA CODE AS
14 A **NEW** CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY
15 1, 2009]:



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Chapter 13. Specifications

Sec. 1. For purposes of this chapter, a contract officer is considered to have full knowledge of the content of the specifications issued by the contract officer and of all acts and omissions of the individuals who prepared the specifications.

Sec. 2. For purposes of this chapter, materials or services are considered to be "brand name" if the materials or services are unique or proprietary to one (1) manufacturer or service provider.

Sec. 3. (a) As used in this chapter, "contract officer" refers to the board or individual responsible for awarding a public work contract.

(b) If the contract officer consists of more than one (1) individual, an action authorized or required of a contract officer must be taken by a majority of the individuals who constitute the contract officer.

Sec. 4. As used in this chapter, "materials" refer to materials, products, or supplies to be used on a public work project.

Sec. 5. As used in this chapter, "specifications" refers to specifications for either of the following:

- (1)** Supplying materials for a public work project.
- (2)** Providing services, including professional services, for a public work project.

Sec. 6. (a) Specifications shall be written to do the following:

- (1)** Encourage free, open, and competitive bidding.
- (2)** Prevent corruption, extravagance, favoritism, graft, and improvidence.
- (3)** Insure honest competition for the best work and materials for a public work project at the lowest reasonable cost.

(b) Specifications must:

- (1)** be based upon generally accepted standards in the applicable industry; and
- (2)** refrain from calling for unique or proprietary materials.

Sec. 7. Specifications may not do any of the following:

- (1)** Exclude prospective bidders by reason of the impossibility of performance by all but one (1) bidder.
- (2)** Exclude prospective bidders by reason of the impossibility of performance by all bidders except those bidders incorporating the products or services of a single manufacturer.
- (3)** Incorporate requirements applicable to alternate or substitute materials or services or bidders proposing the use of alternate or substitute materials or services that differ

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substantially from the requirements to be met by materials or services named in the specifications.

(4) Confer authority to accept or reject alternate or substitute materials upon persons other than:

(A) the contract officer; or

(B) the licensed architect or engineer who prepared the specifications.

(5) Prescribe testing requirements that may be met by only one (1) manufacturer's materials.

(6) Prescribe testing requirements for alternate or substitute materials that are exclusionary due to time or expense for compliance.

(7) Require a standard, restriction, condition, or limitation not directly related to the purpose, function, or activity for which the contract is awarded.

(8) Require any of the following:

(A) The use of materials produced by only one (1) manufacturer.

(B) The use of a process or procedure utilized by only one (1) manufacturer.

(C) A requirement that in fact may be met by the products or services of only one (1) manufacturer.

Sec. 8. (a) For purposes of this section, materials are considered the equivalent of materials of a brand name if, in the opinion of the contract officer, the materials:

(1) are at least equal in quality, durability, strength, appearance, and design;

(2) will perform at least as well the function imposed by the general design for the public work project; or

(3) conform substantially, even with deviations, to the requirements for the materials in the specifications.

(b) A specification may state the kind or quality of materials by referring to a brand name.

(c) Referring to materials by a brand name is considered to mean that the materials supplied must be of the general style, type, character, and quality of the materials identified by the brand name.

(d) Except as provided in subsection (e), a bidder may furnish:

(1) brand name material; or

(2) material that is equivalent to the materials identified by the brand name.

(e) If the contract officer determines that the public work

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project requires materials or a service of a brand name, the contract officer must include in the specifications a statement that justifies the use of the brand name materials. The statement required by this subsection must:

- (1) identify the need for the brand name materials or services;
- (2) explain why the use of the brand named materials or services is in the public interest; and
- (3) state the reasons that other materials or services do not satisfy the need identified in subdivision (1).

The determination required by this subsection must be specifically endorsed by the contract officer in writing.

Sec. 9. (a) A prospective bidder may challenge a specification for violating this chapter by filing a written challenge with the contract officer not later than three (3) days before bids are opened.

(b) If the contract officer rejects a challenge because the material or service does not comply with the specifications, the contract officer must, at the request of the prospective bidder, detail in writing the reasons why the proposed materials or services:

- (1) are not the equal in quality, durability, strength, appearance, or design to;
- (2) will not perform at least equally the function imposed by the general design for the public work as; or
- (3) does not substantially conform to, even with deviations; the materials or services in the specifications.

(c) The contract officer must sign the writing required by subsection (b).

Sec. 10. (a) This section does not prohibit a person from providing free technical assistance to a contract officer.

(b) This section does not prohibit design-build contracts awarded in compliance with IC 5-30.

(c) A contract officer may not award a public work contract to a person if:

- (1) the bid documents or the contract specifies materials or services to be furnished by the person; and
- (2) the person:
 - (A) prepared;
 - (B) participated in the preparation of; or
 - (C) conferred any property on another person who prepared or participated in the preparation of;
 the specifications for the public work project.

(d) A contract officer may not award a public work contract to

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a person if:

- (1) the bid documents or the contract specifies materials or services to be furnished by the person; and
- (2) the person is affiliated with an architect, an engineer, a design consultant, or other consultant employed by the contract officer on the public work project.

Sec. 11. A contract awarded in violation of this chapter is voidable by the political subdivision.

SECTION 3. IC 5-16-14 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]:

Chapter 14. Certification of Plans and Specifications

Sec. 1. This chapter applies to a public work contract, the cost of which is more than one hundred thousand dollars (\$100,000).

Sec. 2. As used in this chapter, "contract officer" has the meaning set forth in IC 5-16-13-3.

Sec. 3. As used in this chapter, "design professional" refers to either of the following:

- (1) An architect registered under IC 25-4.
- (2) An engineer registered under IC 25-31.

Sec. 4. The plans and specifications for a public work project must bear the stamp or seal of the design professional who prepared the plans or the specifications.

Sec. 5. The contract officer shall require that the design professional who prepares the plans or specifications for a public work project must certify that the design professional is certified under Indiana law.

Sec. 6. A contract officer may not artificially divide a public work project into smaller projects to avoid application of this chapter.

SECTION 4. IC 36-1-12-1.2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 1.2. The following definitions apply throughout this chapter:

- (1) "Board" means the board or officer of a political subdivision or an agency having the power to award contracts for public work.
- (2) "Contractor" means a person who is a party to a public work contract with the board.
- (3) "Subcontractor" means a person who is a party to a contract with the contractor and furnishes and performs labor on the public work project. The term includes ~~material men~~ **persons** who ~~supply~~ **provide supplies or materials to** contractors or subcontractors.

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(4) "Escrowed income" means the value of all property held in an escrow account over the escrowed principal in the account.

(5) "Escrowed principal" means the value of all cash and securities or other property placed in an escrow account.

(6) "Operating agreement" has the meaning set forth in IC 5-23-2-7.

(7) "Person" means any association, corporation, limited liability company, fiduciary, individual, joint venture, partnership, sole proprietorship, or any other legal entity.

(8) "Property" means all:

(A) personal property, fixtures, furnishings, inventory, and equipment; and

(B) real property.

(9) "Public fund" means all funds that are:

(A) derived from the established revenue sources of a political subdivision or an agency of a political subdivision; and

(B) deposited in a general or special fund of a municipal corporation, or another political subdivision or agency of a political subdivision.

The term does not include funds received by any person managing or operating a public facility under a duly authorized operating agreement under IC 5-23 or proceeds of bonds payable exclusively by a private entity.

(10) "Retainage" means the amount to be withheld from a payment to the contractor or subcontractor until the occurrence of a specified event.

(11) "Specifications" means a description of the physical characteristics, functional characteristics, extent, or nature of any public work required by the board.

(12) "Substantial completion" refers to the date when the construction of a structure is sufficiently completed, in accordance with the plans and specifications, as modified by any complete change orders agreed to by the parties, so that it can be occupied for the use for which it was intended.

SECTION 5. IC 36-1-12-4, AS AMENDED BY P.L.169-2006, SECTION 48, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 4. (a) This section applies whenever the cost of a public work project will be:

(1) at least seventy-five thousand dollars (\$75,000) in:

(A) a consolidated city or second class city;

(B) a county containing a consolidated city or second class city; or

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- 1 (C) a regional water or sewage district established under
 2 IC 13-26; or
 3 (2) at least fifty thousand dollars (\$50,000) in a political
 4 subdivision or an agency not described in subdivision (1).
 5 (b) The board must comply with the following procedure:
 6 (1) The board shall prepare general plans and specifications:
 7 (A) describing the kind of public work required; ~~but shall~~
 8 ~~avoid specifications which might unduly limit competition;~~
 9 ~~and~~
 10 (B) **comply with IC 5-16-13.**
 11 If the project involves the resurfacing (as defined by IC 8-14-2-1)
 12 of a road, street, or bridge, the specifications must show how the
 13 weight or volume of the materials will be accurately measured
 14 and verified.
 15 (2) The board shall file the plans and specifications in a place
 16 reasonably accessible to the public, which shall be specified in the
 17 notice required by subdivision (3).
 18 (3) Upon the filing of the plans and specifications, the board shall
 19 publish notice in accordance with IC 5-3-1 calling for sealed
 20 proposals for the public work needed.
 21 (4) The notice must specify the place where the plans and
 22 specifications are on file and the date fixed for receiving bids.
 23 (5) The period of time between the date of the first publication
 24 and the date of receiving bids shall be governed by the size of the
 25 contemplated project in the discretion of the board, but it may not
 26 be more than six (6) weeks.
 27 (6) If the cost of a project is one hundred thousand dollars
 28 (\$100,000) or more, the board shall require the bidder to submit
 29 a financial statement, a statement of experience, a proposed plan
 30 or plans for performing the public work, and the equipment that
 31 the bidder has available for the performance of the public work.
 32 The statement shall be submitted on forms prescribed by the state
 33 board of accounts.
 34 **(7) If the board makes the attendance of a bidder at a pre-bid**
 35 **meeting or conference a condition to the acceptance of a bid**
 36 **from that bidder, the board shall publish notice of the date**
 37 **and time of the pre-bid meeting or conference in the same**
 38 **fashion and for the same period as the board must advertise**
 39 **the date of receiving bids under IC 5-3-1.**
 40 ~~(7)~~ (8) The board may not require a bidder to submit a bid before
 41 the meeting at which bids are to be received. The meeting for
 42 receiving bids must be open to the public. All bids received shall

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be opened publicly and read aloud at the time and place designated and not before.

~~(8)~~ (9) Except as provided in subsection (c), the board shall:

(A) award the contract for public work or improvements to the lowest responsible and responsive bidder; or

(B) reject all bids submitted.

~~(9)~~ (10) If the board awards the contract to a bidder other than the lowest bidder, the board must state in the minutes or memoranda, at the time the award is made, the factors used to determine which bidder is the lowest responsible and responsive bidder and to justify the award. The board shall keep a copy of the minutes or memoranda available for public inspection.

~~(10)~~ (11) In determining whether a bidder is responsive, the board may consider the following factors:

(A) Whether the bidder has submitted a bid or quote that conforms in all material respects to the specifications.

(B) Whether the bidder has submitted a bid that complies specifically with the invitation to bid and the instructions to bidders.

(C) Whether the bidder has complied with all applicable statutes, ordinances, resolutions, or rules pertaining to the award of a public contract.

~~(11)~~ (12) In determining whether a bidder is a responsible bidder, the board may consider the following factors:

(A) The ability and capacity of the bidder to perform the work.

(B) The integrity, character, and reputation of the bidder.

(C) The competence and experience of the bidder.

~~(12)~~ (13) The board shall require the bidder to submit an affidavit, **signed and sworn under the penalties for perjury:**

(A) that the bidder has not entered into a combination or agreement:

(i) relative to the price to be bid by a person;

(ii) to prevent a person from bidding; ~~or~~

(iii) to induce a person to refrain from bidding; ~~and or~~

(iv) to use bid specifications that violate IC 5-16-13; and

(B) that the bidder's bid is made without reference to any other bid.

(c) Notwithstanding subsection ~~(b)(8)~~; **(b)(9)**, a county may award sand, gravel, asphalt paving materials, or crushed stone contracts to more than one (1) responsible and responsive bidder if the specifications allow for bids to be based upon service to specific geographic areas and the contracts are awarded by geographic area.

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The geographic areas do not need to be described in the specifications.

SECTION 6. IC 36-1-12-15 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 15. (a) A contract by the board for public work must conform to the ~~wage scale provisions of IC 5-16-7.~~

(b) A contract by the board for public work must conform with following:

(1) The antidiscrimination provisions of IC 5-16-6.

(2) The wage scale provisions of IC 5-16-7.

(3) IC 5-16-8.

(4) IC 5-16-9.

(5) IC 5-16-10.

(6) IC 5-16-11.1.

(7) IC 5-16-13.

(8) IC 5-16-14.

(b) The board may consider a violation of IC 5-16-6 a material breach of the contract, as provided in IC 22-9-1-10.

SECTION 7. IC 35-44-1-8 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 8. (a) As used in this section, "contract officer" refers to:

(1) the board or individual responsible for awarding a public work contract; or

(2) an architect, engineer, or other individual retained by the board or individual described in subdivision (1) to advise the board or individual with respect to the award of a public work contract.

(b) A contract officer may not solicit, accept, or agree to accept any property from a person in return for the contract officer's agreement to do any of the following:

(1) To purchase or recommend the purchase of that person's supplies, materials, or services with respect to a public work project.

(2) To incorporate or recommend incorporation of the person's supplies, materials, or services into specifications for a public work project.

(3) To award or recommend the award of a public work contract to that person.

(4) To recommend, promote, or endorse that person's supplies, materials, or services with respect to the public work project.

(c) A person may not offer, confer, or agree to confer any

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1 property on a contract officer for the contract officer's agreement
 2 to do any act described in subsection (b).
 3 (d) A person may not solicit, accept, or agree to accept any
 4 property in return for an agreement:
 5 (1) not to bid or compete on a public work project; or
 6 (2) to participate in an arrangement to suppress or eliminate
 7 full and unrestricted competition for the award of a public
 8 work contract.
 9 (e) A person who recklessly, knowingly, or intentionally violates
 10 this section commits a Class D felony.
 11 SECTION 8. IC 36-1-12-7 IS REPEALED [EFFECTIVE JULY 1,
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